Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

79-1871

ANITA P. CASTILLO,

Petitioner

-vs-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Robert J. Carluccio
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One Newark Street
Hoboken, N.J. 07030

Counsel for Petitioner

AUTHORITIES CITED

Cases: PAGE

Arlington Earl Bodden and Maureen Eleanor Bodden, Immigration File Nos. A20 978 896 and A20 978 898..... 10

Matter of S, 5IN409 (1953)..... 12

Matter of U, 5IN413 (1953)..... 12

Matter of Z, 5IN419 (1953)..... 12

Urbano de Malaluan vs. Immigration and Naturalization 577 F.2d 589 (1978)..... 9

Statutes:

Section 244(a)(1) Immigration and Nationality Act 8 U.S.C.A. Sec. 1254(a)(1)..... 5

Anita P. Castillo prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 31, 1980 (Court of Appeals opinion, infra, p. A16).

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is included in the Appendix beginning at page A1. The opinion of the Board of Immigration Appeals is included in the Appendix at page A11. The decision of the Immigration and Naturalization Service is included at page A7.

## JURISDICTION

The judgment of the United States Court of Appeals was entered on January 14, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1)(1966).

## QUESTIONS PRESENTED

1. The Board of Immigration Appeals, and the Immigration Hearing Judge and the United States Court of Appeals erroneously interpreted Section 244(a)(1) of the Immigration and Nationality Act as it applies to the petitioner in determining that she did not qualify under the extreme hardship requirement in order for a stay of deportation to be granted.

2. Whether petitioner, Anita P. Castillo, and her American-born child would be subject to'extreme hardship' as required by Section 244(a)(1) of the Immigration and Nationality Act if both were to be deported to the Philippines.

3. Whether deportation of petitioner, Anita P. Castillo, would deprive her American-born child of life, liberty,

property and the pursuit of happiness as protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

## STATUTE INVOLVED

The relevant portion of Section 244(a)(1) and (2) of the Immigration and

Nationality Act covers a situation where an alien in this category qualifies for suspension of deportation only if his deportation "would in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

STATEMENT OF THE CASE

The Petitioner entered the United States on or about August 16, 1968, as a worker for an employee of the United Nations and was authorized to remain until January 31, 1973.

On September 27, 1977, an Order to Show Cause was issued by the Immigration and Naturalization Service alleging that the Petitioner was de-

portable as an overstay on the ground that she had remained in the United States beyond January 31, 1973, without authorization.

On Feb.8/78, she appeared voluntarily before an Immigration Judge and conceded the allegations in the Order to Show Cause. On that same date, the Immigration Judge found the Petitioner deportable as charged and denied her application for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1), but granted her the right of voluntary departure.

The Immigration Judge denied Petitioner's application for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1) on the ground that Petitioner did not establish, pursuant

to said section, that her deportation would result in extreme hardship to herself or to her United States citizen child.

Petitioner is an unmarried, 36 year-old native and citizen of the Philippines. On February 28, 1974, a child was born of Petitioner out of wedlock, in the United States.

Petitioner has lived in the United States continuously for at least seven years. That Petitioner has been of good moral character is evident by the excellent working relationship she has formed at her present place of employment, the Greenville Hospital, Jersey City, New Jersey, as a Nurses' Aid for the past seven years.

The practical result of deporting Petitioner would be that her

American-born child would also be forced to go to the Philippines and leave her native America. As a consequence, the American-born child would be subject to much scorn in that she would be an illegitimate child in a rigid, highly structured patriarchal Philippine Society. Secondly, as an American-born citizen she is entitled to all of the incidents and privileges of that citizenship. Deportation of her mother would of necessity deprive her of all the educational, social, cultural and medical advantages.

Petitioner has appealed to the Board of Immigration Appeals. The Appeal was dismissed. We are now submitting to you this Petition for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### I

That Petitioner has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of said application and that petitioner has been and is of good moral character pursuant to the requirements of Sec. 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C.A. Sec.1254(a)(1) are not in dispute in this matter. The sole question presented before this Court is whether the Board of Immigration Appeals, the Immigration Hearing Judge and the United States Court of Appeals erroneously interpreted Sec.244(a)(1) of the Immigration and Nationality Act as it pertains

to the extreme hardship requirement for a stay of deportation.

It is well settled law that economic hardship alone is not enough to sustain a finding of extreme hardship under the statute, KASRAVI -V- INS., 400 F.2d 675 (9th Cir. 1968). However, in Urbano de Malaluan v. Immigration and Naturalization, 577 F.2d 589 (1978) the Court states that although economic hardship alone is insufficient, it may be considered along with other factors to determine whether extreme hardship has been met. The Court outlines the other factors to be considered as follows:

> "The Attorney General or his designee, under the statute, is to consider the hardship, not only upon the alien herself, but upon the children of the alien who are United States citizens...

> It is the hardship imposed upon both the Petitioner and the children that must be evaluated.

Thus, Urbano stands for the proposition that economic hardship to the parent alone must not be considered but that its affect on the child born within the United States is another relevant factor. A 1977 decision of the Board of Immigration Appeals has also expanded the scope of factors to consider for the statute. In Arlington Earl Bodden and Maureen Eleanor Badden, Immigration File Nos. A20 978 896 and A20 978 898, where extreme hardship was found for both deportable aliens with two children the Court stated:

> "Extreme hardship" is not a definable term of fixed and inflexiable content, but necessarily depends upon the facts and circumstances peculiar to each case"

We think that the combination of uprooting, cultural shock, forced liquidation of business and home, substantially diminished educational and economic opportunites, and the improbability that they could immigrate to this country legally, would impose an "extreme hardship" on the entire family.

Thus a definition of extreme hardship turns upon the facts and circumstances of each particular case and may take into consideration a combination of uprooting, cultural shock, substantially diminished educational and economic opportunities and the probability of returning to the country legally

The Board of Immigration Appeals has also laid out the following criteria

to be considered in determining whether or not extreme hardship is met:

1. Length of residence in United States.
2. Family ties in United States.
3. Possibility of obtaining a visa abroad and,
4. Financial burden on alien having to go abroad to obtain a visa. Matter of U, 5IN413 (1953).

Extreme hardship has also been found where a person would suffer a long delay in obtaining a visa in her native country because of limited assets. Matter of S, 5IN409 (1953).

Also where there is a probable loss of livelihood if deported. Matter of Z, 5IN419 (1953).

The Courts as a rule have not accepted economic hardship as the only factor to arrive at a determination of extreme hardship.

However, taking into account the flexibility and case by case determination that the Courts have utilized, we may arrive at a series of other factors which, along with economic hardship to the alien, may be enough to satisfy the requirements of the statute.

In summary, these factors are length of residence, family ties, possibility of obtaining a visa abroad, financial burden of alien having to go abroad to obtain a visa, the economic hardship experienced by the American-born child, cultural shock and diminished educational and economic opportunities.

II

Petitioner, Anita P. Castillo, and her American-born child would be

subject to extreme hardship as required by Section 244(a)(1) of the Immigration and Nationality Act if both were to be deported to the Philippines. Applying the above-mentioned factors to the case at bar:

a. Length of residence in the United States. We believe that twelve years in the United States is more than a reasonable amount of time by which an alien could establish enough ties within this country and a mode of living that would cause extreme hardship if deported out.

b. Possibility of obtaining a visa abroad. If Anita Castillo is deported back to her native country, the Philippines, there is no doubt that it would be nearly impossible for her to obtain a visa. Petitioner is of humble means and the financial burden on her to obtain a visa abroad outweighs her economic resources

c. The economic hardship experienced by the American-born child. Petitioner's child is already seven years of age and has grown accustomed to decent medical and hygiene and nutrition. Although the Philippines is a developing country, their health and nutritional facilities do not compare with those of the United States. To deport petitioner and her child would undeniably cause both economic and hygiene hardship.

d. Cultural shock. Petitioner's child who was born illegitimate and whose father would presumably remain in the United States could, no doubt, be the subject of much scorn and derision because of her illegitimate birth. The Philippines are a fine and warm people but their society is nevertheless a rigid and highly structured pariarchal one. Not having a father is a disability for a child wherever she may live but the problem would only be compounded by her having to live there. Not only would her real father be missing but he would be an American father. Petitioner's presence in the Philippines would undoubtedly cause cultural shock as a result of this

It is well settled that before applying the Due Process Clause of the Fourteenth Amendment the Court must first determine whether the private interest at stake is an interest in property or liberty portected by the Fourteenth Amendment. Balier-Chaput vs. Channett, 406 F. Supp. 1134.

The liberty provision of the Fourteenth Amendment prohibiting a state from depriving any person of life, liberty or property without due process of law encompasses, "the right of every citizen to be free in enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation..." Madera v. Board of

Education of City of New York, 386 F.2d 778, cert. denied 88 S.Ct. 1416, 390 U.S. 1028, 20 LEd 2d 284.

That petitioner's American-born child would be deprived of her right to liberty and property, by deporting petitioner, is clear. The deprivation will be indirectly what it would not do directly, but be a true deprivation nevertheless. However, to deport said child's mother to the Philippines, would deprive her of her rights because what other recourse is left but to follow her natural mother to the Philippines and leaving her native country.

We are not talking solely of petitioner's rights in this matter, but we must consider an American-born child's deprivation of her rights to the free enjoyment of a life in the United States.

## CONCLUSION

In Summary, we believe that taking into consideration:

a) the length of residence in the United States of petitioner (twelve years).

b) the near impossibility of obtaining a visa in the Philippines.

c) the economic and hygiene hardship experienced by the American-born child and,

d) cultural shock experienced by the child would inevitably subject both petitioner, Anita P. Castillo, and her child to extreme hardship as required by Section 244(a)(1) of the Immigration and Nationality Act if both were to be deported to the Philippines and as such a stay of deportation must be granted.

Respectfully submitted,

ROBERT J. CARLUCCIO

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

June 5, 1979

File A21 688 794 - Newark

In re: ANITA P. CASTILLO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert J. Carluccio, Esq.
One Newark Street
Hoboken, New Jersey 07030

CHARGE:

Order: Sec.241(a)(2), I&N Act (8U.S.C. 1251) (a)(2)) - Nonimmigrant O remained longer than permitted

APPLICATION: Suspension of deportation

In a decision dated February 8, 1978, the immigration judge found the respondent deportable as charged and denied her application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1), but granted her the privilege of voluntary departure. The respondent has appealed. The appeal will be dismissed.

The respondent is an unmarried, 36-year old native and citizen of the Philippines. She entered the United States on or about August 16, 1968, as a worker for an employee of the United Nations and was authorized to remain until January 31, 1973. See section 101(a)(15)(G)(v) of the Act, 8 U.S.C. 1101(a)(15)(G)(v).

On September 27, 1977, an Order to Show

Cause was issued alleging that the respondent was deportable as an overstay on the ground that she had remained in the United States beyond January 31, 1973, without authorization. On February 8, 1978, she appeared before an immigration judge and conceded the allegations in the Order to Show Cause. We find that the respondent's deportability has been established by evidence that is clear, convincing, and unequivocal.

Eligibility for suspension of deportation in this case is governed by section 244(a)(1) of the Act. This section requires that the respondent shall have been physically present in the United States for a period of at least seven years immediately preceding the date of her application and that she proves that, during all of such period, she was and is a person of good moral character. In addition, the respondent has the burden of showing that her deportation would result in extreme hardship to herself or to a spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence.

The immigration judge denied the respondent's application for suspension of deportation on the ground that the respondent did not establish that her deportation would result in extreme hardship to herself or to her United States citizen child.

The record indicates that the respondent graduated from high school in the Philippines and then went to a fashion school there to study dress making. Afterwards, she worked as a seamstress at her aunt's dress shop in the Philippines. The respondent stated at the hearing that she did not know whether her aunt still operated the shop.

The respondent entered the United States in 1978, when she was 25 years old. She has been working as a nurse's aide at a hospital in the United States since 1971, and appears to be earning approximately $165. a week.

The respondent also stated that a child was born to her out of wedlock on February 28, 1974, in the United States. Although she introduced a birth certificate in support of this claim, the birth certificate does not contain any information which reflects that the respondent is the child's mother. The child's name is "Divina Andrada," and the certificate does not contain the names of her parents.

The respondent testified further that her father is living in the Philippines, He supports himself with a fishing business that he runs with one of the respondent's cousins, and he also operates a small rice plantation.

We find that the respondent has been physically present in the United States continuously for a period of at least seven years immediately preceding the date of her application for suspension of deportation. We further find that the respondent has been a person of good moral character during the period in which she has been in the United States.

The remaining issue to be resolved is whether the respondent or her alleged child would suffer extreme hardship if the respondent were deported. The respondent contends that she has been an ideal citizen during the ten years she has spent in this country, that she has worked steadily, that she has made a suitable home here for her child, and that she has many friends here. She claims that her deportation would be very difficult for her daughter, especially since she does not have a father, and would of necessity deprive her of the

educational, social, cultural and medical advantages of her United States citizenship.

We find that the respondent should have no serious difficulties adjusting to life in the Philippines. She was an adult when she departed the Philippines and is familiar with the language and culture of that country. Moreover, her close relatives reside there which should make adjustment easier. Although the respondent's deportation might result in some economic detriment to her, we are not persuaded that she would suffer "extreme hardship" within the meaning of section 244(a)(1) of the Act. Matter of Anderson, Interim Decision 2669 (BIA 1978); Matter of Kim, Interim Decision 2318 (BIA 1974); Matter of Sangster, 11 I&N Dec.309 (BIA 1965).

Moreover, we find that the respondent has not established that her deportation would result in extreme hardship to her alleged United States citizen child either. Mater of Kim, supra. The child is young enough to adjust to living in the Philippines, and there is no evidence that the respondent would not be able to support and educate her there. Finally, it is not apparent that the child would lack educational and economic opportunities in the Philippines, nor does it appear that the educational and economic situation there would be such as to preclude her from ever returning to the United States.

We conclude that the respondent has failed to sustain her burden of proof that she or her alleged child would suffer extreme hardship as claimed. Therefore, she is not eligible for suspension of deportation under section 244(a)(1) of the Act. Accordingly, the appeal will be dismissed.

Because the term of voluntary departure granted the respondent by the immigration judge has expired, we shall grant the respondent 30 days in which to depart from the United States vol-

untarily. See Matter of Chouliaris, Interim Decision 2572 (BIA 1977). The following order will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent is permitted to depart from the United States voluntarily within 30 days from this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

David L. Milhollan

Chairman

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 79-2008

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ANITA P. CASTILLO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

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Petition for Review From the
Board of Immigration Appeals

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Submitted Under Third Circuit Rule 12(6)
January 14, 1980

Before: HUNTER, VAN DUSEN and SLOVITER,
Circuit Judges

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JUDGMENT ORDER

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After consideration of all contentions raised by petitioner and by the Board of Immigration Appeals, it is

ADJUDGED and ORDERED that the petition for review of the final order of deportation of the Board of Immigration Appeals be and is hereby denied.

BY THE COURT,

Circuit Judge

Attest:

M. Elizabeth Ferguson
Chief Deputy Clerk

Dated: January 31, 1980

Certified as a true copy and issued in lieu of a formal mandate on February 22, 1980.

Test: M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File No. A21 688 794 - Newark, New Jersey
February 8, 1978

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| In the Matter of | ) | |
| | ) | IN DEPORTATION |
| ANITA P. CASTILLO | ) | PROCEEDINGS |
| | ) | |
| Respondent | ) | |

CHARGE: I&N Act - Section 241(a)(2) - Remained for a Longer Time than Permitted.

APPLICATION: I&N Act - Section 244(a) - Suspension of Deportation and in the Alternative Voluntary Departure.

IN BEHALF OF RESPONDENT:
Robert J. Carluccio, Esq.
1 Newark Street
Hoboken, N.J. 07030

IN BEHALF OF SERVICE:
Sydney B. Rosenberg
Trial Attorney
Newark, New Jersey

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 35 year old, single female alien, native and citizen of the Philippines. She last entered the United States on August 16, 1968 at Honolulu, Hawaii at which time she was admitted as a worker for an employee of the United Nat-ons and authorized to remain in the United States until January 31, 1973. She has remained thereafter without authority and is therefore deportable on the charges contained in the Order to Show Cause. The respondent has applied for suspension of deportation under Section 244(a) of the Immigration and

Nationality Act as amended. Her application properly falls within Section 244(a)(1) of the Act as she is not deportable under any of the provisions of Section 241(a) cited and Section 244(a)(2) of the Act. The respondent has been continuously physically present in the United States since her arrival in 1968. She has established this physical presence with the I-94 as presented by Trial Attorney, the letter from the Immigration to the State Department showing that she is an employee of a United States diplomat and her passport and the birth certificate of her child. She is presnetly employed by the Greenville Hospital in Jersey City, New Jersey. Inquiry has disclosed that this respondent has never had any connection with subversive organizations and she has established that she meets the physical presence of good moral character requirements of the statutes.

The respondent has testified that if she has to go back to her native land of the Philippines she will not be able to find suitable employment, she will receive a lower salary and that her child

would not obtain the same type of an education that would be offered here in the United States. She stated she has a father that owns a small rice plantation in the Philippines and a half sister. The record also reveals that the respondent did finish high school and that she attended a trade school in which she learned to be a fashion designer and is capable of designing and doing different types of work as a seamstress fashion designer. Upon close examination by the Trial Attorney the respondent indicated that she had filed an income tax return and that she has complied with all the rules and regulations as required by residence of citizens of the United States. She further stated that she had most of her friends in the United States and that she has made new friends with United States Citizens and former residents of the Philippines who are now citizens or permanent residents of the United States.

The only issue before me today is whether the deportation of the respondent, who has only one

United States citizen child in the United States would constitute extreme hardship within the contemplation of the statute. It is well settled that economic detriment is not in itself sufficient to establish extreme hardship or suspension of deportation under Section 244(a)(1) of the Act, Matter of Kim, Interim Decision 2318 decided August 22, 1974; Matter of Kajoori, 12 I&N Decision 309; and Matter of Uy, 11 I&N Decision 159. I have taken into consideration all the facts as presented including the difficulties the respondent indicates she would encounter if she has to go back to the Philippines. She has stated that she would have difficulty finding employment and that her child would have difficulty in obtaining the same type of an education. Based upon the case law and the decisions of the Board of Immigration Appeals I find that the respondent has failed to meet the burden placed upon her to show that she would usffer extreme hardship as required by Section 244(a)(1) of the Immigration and Nationality Act. Economic disadvantage does not constitute required statutory hardship. Fong Choi Yu vs.

I&NS, 439 F. 2d. 719, 9th Cir. 1971; Nishikage vs. I&NS, 433 F. 2d.904, 9th Cir. 1971. Her application for suspension of deportation is therefore denied. She will be granted the privilege of voluntary departure.

ORDER: IT IS ORDERED that the respondent's application for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation respondent be granted voluntary departure on or before sixty days from the date of this order or any extension that may be granted by the District Director.

IT IS FURTHER ORDERED that if the respondent should fail to depart as required she shall be deported to the Philippines on the charge as contained in the Order to Show Cause.

Nathan W. Gordon
Immigration Judge